

NO. 80922-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JESSE MAGAÑA,

Petitioner,

vs.

HYUNDAI MOTOR AMERICA; HYUNDAI MOTOR COMPANY;

Respondents,

and

RICKY and ANGELA SMITH, husband and wife; et al.,

Defendants.

SUPPLEMENTAL BRIEF OF PETITIONER

Paul W. Whelan, WSBA 2308
Ray Kahler, WSBA 26171
STRITMATTER KESSLER
WHELAN COLUCCIO

Derek Vanderwood, WSBA 24257
ENGLISH, LANE, MARSHALL &
VANDERWOOD, PLLC

Peter O'Neil, WSBA 28198
PETER O'NEIL,
ATTORNEY AT LAW

Michael E. Withey, WSBA 4787
LAW OFFICES OF MICHAEL
WITHEY

Alisa Brodkowitz, WSBA 31749
BRODKOWITZ LAW

WIGGINS & MASTERS, P.L.L.C.
Charles K. Wiggins, WSBA 6948
Kenneth W. Masters, WSBA 22278
Shelby Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorneys for Petitioner

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INTRODUCTION

All three Court of Appeals judges agreed that Hyundai's responses to Magana's discovery requests for other seatback failure claims were "false, evasive, and misleading." ***Magana v. Hyundai Motor Am.***, 141 Wn. App. 495, 513 ¶¶37, 527 ¶¶ 69, 170 P.3d 1165 (2007) *rev. granted*, 164 Wn.2d 1020 (2008) ("COA at ¶¶ 37, 69").¹ Hyundai acted willfully and deliberately, in bad faith, and delayed discovery for many years. It withheld over forty incidents of seat back failure, producing them only after an express court order, and defied the order by never producing ***Acevedo***, a litigated case in which the driver's seat collapsed, rendering the nine year old child in the back seat quadriplegic.

The trial court reacted appropriately to Hyundai's willful and deliberate lies. It heard two days of testimony, considered possible sanctions, and imposed an appropriate sanction after carefully reviewing controlling Washington authorities. The appellate court reversed, substituting its own decision for sound trial court discretion.

¹ The paragraph numbers in this brief are from the official version of the decision. The numbering in the earlier Lexis version appended to the Petition and used in the Petition varies slightly from the official version.

The appellate court majority blames Jesse Magaña, retreating to an earlier day of: tolerating misbehavior, instead of punishing violators; condoning discovery abuse, instead of educating and deterring would-be violators; and rewarding the obstructionist party with further delay, instead of protecting victims of discovery abuse. This Court should reverse.

ISSUES

1. Did the trial court abuse its discretion in finding that Jesse Magaña was severely prejudiced when Hyundai deliberately gave willfully false discovery responses for over five years, where

- ♦ this case had been pending since February 2000, while Magaña has desperately needed funds for adequate medical care for his paraplegia and related ailments for over 11 years, CP 4836-38;
- ♦ Hyundai's late disclosure made the trial date impossible to meet, Finding of Fact ("FF") 60, CP 5331 (findings attached as Appendix B); CP 2350, 2666, 2668, 2670; 01/17/06 RP 136-40; 01/18/06 RP 16-17;
- ♦ the withheld evidence was highly relevant to the central issue in the case – existence of a product defect, FF 56, 59, CP 5330-31; CP 2665, 2669; 01/17/06 RP 114-15; 01/18/06 RP 17;
- ♦ the withheld evidence was highly relevant to causation of Magaña's injuries, FF 57-58, CP 5330; 01/17/06 RP 114-16; 01/18/06 RP 17;
- ♦ Magaña was deprived of substantial opportunities to explore and analyze the evidence, FF 55, 64, CP 5329-30, 5332; 01/17/06 RP 90-96, 118-21, 123-27;

- ♦ Magaña lost his opportunity to add a failure to warn claim in this case, FF 55, CP 5329-30; 01/18/06 RP 18; 01/17/06 RP 115;
- ♦ evidence was lost and became irretrievable during Hyundai's willful concealment, FF 55, 68, CP 5329-30, 5333; 01/17/06 RP 90-96, 98-101, 110; Ex 1;
- ♦ Hyundai's willful concealment prejudiced the administration of justice by making it impossible for the court to weigh the relevance of the concealed evidence, FF 62, CP 5331; CP 2652;
- ♦ a continuance would cause unnecessary delay and expense for Magaña, FF 69, CP 5333;
- ♦ Magaña was off pursuing one theory of liability when he would have been pursuing the evidence of "other similar incidents" had Hyundai told the truth. 01/20/06 RP 32.

2. Does the evidence support the trial court's findings and conclusion that lesser sanctions are inadequate to properly compensate Magaña, while deterring, punishing and educating Hyundai and others, and ensuring that Hyundai would not profit from its wrongs?

3. Was Magaña's inability to prepare by the scheduled trial date caused by Hyundai's lies or Magaña's tactics and strategy?

STATEMENT OF THE CASE

A. Despite Hyundai's quibbling about factual findings that it does not challenge in this Court, Hyundai's discovery evasion and lies are conclusively established.

The trial court ruled and the appellate court affirmed that:

Hyundai perpetrated multiple discovery violations;

Hyundai could not unilaterally limit “discovery” to “attorney demand letters” in Hyundai’s corporate legal department;

The parties never agreed to narrow the discovery requests;

Hyundai’s attempts to unilaterally narrow Magaña’s discovery requests failed, and the requests encompassed the withheld OSIs; and that

Hyundai’s violations were willful and deliberate lies.

FF 6-53, CP 5315-29; COA ¶¶ 31-40; BR 13-23. Not only does Hyundai fail to dispute these findings in this Court, but it expressly declined to ask for this Court’s review. Answer to Petition at 6 n.4, 7 n.5 & 20 (disclaiming any cross-petition issues).

B. The trial court properly found that Jesse Magaña – and our system of justice – suffered severe prejudice due to Hyundai’s willful and deliberate evasion and lies.

Discovery abuse damages our very system of justice because, as former Justice Utter declared, it “interferes with the judicial system’s ability to engage in the truth-seeking process. . . . is inconsistent with the good order of society and unbalances the truth seeking process.” FF 54, CP 5329.

As the trial court found, Hyundai’s willful discovery violations substantially prejudiced Magaña’s ability to prepare for trial. Everyone agrees that evidence of other similar incidents (OSIs) is a standard method of proving a product liability claim. See, e.g., CP 2649, 2665, 2669, 3263-64; FF 55-56, CP 5329-30. But Hyundai’s

willful and deliberate lies about OSIs meant that Magaña was off pursuing other theories of liability when he could have been pursuing OSI evidence. FF 64, CP 5332.

Hyundai's machinations also prejudiced Magaña's ability to prepare for trial in many other ways:

- ♦ Timely disclosure would have allowed investigation of these other incidents of seat back failure, development of this evidence, and the discovery of additional information (FF 55, CP 5329);
- ♦ Magaña would have hired experts to work up the evidence, learned of other people injured by Hyundai's defective design, ensured that such relevant evidence was preserved, and benefited from their experts' analyses (*id.*);
- ♦ Magaña would have strengthened his claims of product defect and failure to warn, weakened Hyundai's defense that the product was not defective, perhaps forced a settlement, and strengthened his other liability theories using this undisclosed, material evidence. FF 55-58, CP 5329-30.

Hyundai's late-produced discovery of pre-1997 seat back failures gave rise to a claim for post-manufacture failure to warn. CP 4298-4300. Magaña moved to amend to allege this claim, CP 4293, explaining that counsel could not have pled it previously without a factual basis. 1/13/06 RP 61-62. Magaña dropped the motion when Hyundai argued for a continuance. *Id.*

Every day of delay prejudices Magaña. Hyundai's false responses to discovery have delayed Magaña's ability to use the jury

verdict to help him live a healthier life with the quality medical care he needs. See CP 4836-38.

C. The trial court correctly found that no lesser sanction would properly compensate Magaña, while deterring, punishing and educating Hyundai and others, and ensuring that Hyundai would not profit from its wrongs.

While the two-judge majority did not reach the question, the trial court (and dissenting Judge Bridgewater) found and concluded that no lesser sanction than default would suffice to cure the overwhelming prejudice to Jesse Magaña and the justice system. FF 65-74, CP 5332-35. The trial court correctly considered the well-established purposes of discovery sanctions: to deter, punish, compensate and educate, and to insure that the wrongdoer does not profit from its wrongs. FF 66, CP 5332; accord *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993) (*Fisons*). It also considered and rejected several alternative sanctions. FF 65-74, CP 5332-35. The evidence supports the trial court.

The trial court correctly found that no mere monetary fine would deter, punish or educate a multi-billion-dollar corporation like Hyundai. FF 67-68, CP 5332-33. Nor would money compensate Magaña or the justice system for the irrevocable harms that

Hyundai's deceit inflicted. FF 68, CP 5333. And it could not turn back the clock to permit Magaña and his experts to carefully search out, study, and marshal OSI evidence to present at a trial scheduled to begin on January 13, 2006.

This is particularly true as to the most telling seat back failures, Martinez, McQuary and Salizar. These showed for the first time that Hyundai's original discovery responses were false when made prior to the first trial. FF 12-14, CP 5316-17. Hyundai finally disclosed these seat back failures less than two weeks before the scheduled remand trial date, utterly destroying any chance for a fair and timely trial. FF 40-41, 70, CP 5324-25, 5333-34.

Hyundai argued vehemently that a continuance was the only appropriate sanction. 1/19/06 RP 69-72, 89, 91, 94. But just one week earlier Judge Johnson had denied Hyundai's motion for a continuance to accommodate a family issue for one of Hyundai's three trial counsel. CP 4351. Like Br'er Fox throwing Br'er Rabbit into the briar patch, Judge Johnson would have rewarded Hyundai by a continuance; she would not have sanctioned Hyundai. FF 69, CP 5333. A continuance was no remedy.

The trial court also considered other potential sanctions. FF 69-70, CP 5333-34. Since no counterclaims existed and numerous

issues had been resolved in the prior appeal, striking claims or defenses would not help. *Id.* The trial court considered admitting the OSIs, or at least some of them, while precluding Hyundai from objecting. FF 70, CP 5333-34. But they were disclosed too late to permit Magaña to properly develop and address them. *Id.* And much of the evidence had been lost. *Id.*; see also, Ex 1, 01/17/06 RP 90-96 (files were purged, witnesses had vanished, and at least one victim had died), 98-102 (owner of OSI seat disposed of relevant evidence in 2005); 1/18/06 RP 86-87 (even Hyundai's own expert admitted that it is important to investigate OSIs while "fresh").

Moreover, Hyundai took this option off the table when it insisted in closing argument, "Admitting all the OSI evidence is tantamount to a default. We might as well skip a trial." 01/19/06 RP 92; FF 70, CP 5334. The trial court correctly addressed and rejected all lesser sanctions.

ARGUMENT

- A. The appellate court majority ignored the holdings of this Court in *Fisons* and the appellate court in *Behr*, as well as changes in discovery rules, relying instead on outdated case law.**

The appellate court cites this Court's controlling standard, abuse of discretion. COA ¶ 27 (citing *Fisons*). But instead of

deferring to the trial court's discretion, the appellate court majority effectively employs the de novo review urged by Hyundai, BA 51-56, substituting its own discretion for that of the trial court.

The question is whether the trial judge abused her discretion, not what the appellate majority would have done:

The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.

Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 642, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976) ("**NHL**"). This is wholly consistent with **Fisons**, *supra*, and decisions of courts across the country.

The appellate court majority decision is also contrary to appellate court decisions upholding the trial court's exercise of discretion in imposing the sanction of default. **Smith v. Behr Process Corp.**, 113 Wn. App. 306, 54 P.3d 665 (2002); **Rhinehart v. Seattle Times Co.**, 51 Wn. App. 561, 577, 754 P.2d 1243, *rev. denied*, 111 Wn.2d 1025 (1988); **Anderson v. Mohundro**, 24 Wn. App. 569, 575, 604 P.2d 181 (1979), *rev. denied*, 93 Wn.2d 1013 (1980); **Associated Mortgage Invest. v. G. P. Kent Const. Co.**,

15 Wn. App. 223, 548 P.2d 558, *rev. denied*, 87 Wn.2d 1006 (1976).

The appellate court majority unsuccessfully attempts to distinguish ***Associated Mortgage*** on the ground that it involved disobedience of a court order. COA ¶ 45 n. 19. But in 1976, CR 26(g), on which the trial court relied in this case, CL 1,4, CP 5335, 5337, did not exist, as it was not adopted until 1985. ***Fisons*** at 340. Nor did CR 37(d) provide then, as it has since 1993, that “an evasive or misleading answer is to be treated as a failure to answer.” CL 1, CP 5336. Prior to these rule changes, ***Associated Mortgage*** required disobedience of a court order. The same is true of ***Anderson***, *supra*, which predates the 1985 rule change, and ***Rhinehart***, which is based on a 1981 discovery order. 51 Wn. App. at 573-74.

The ***Behr*** case illustrates the change wrought by this Court’s rule amendments and ***Fisons***. An evasive and misleading answer to discovery can now serve as the basis for a default without a prior court order. The appellate court majority erred by seeking to turn back the clock to the pre-***Fisons*** era of discovery abuse.

B. A request to update outstanding discovery responses does not excuse the prejudice from withholding relevant evidence from the initial responses.

The appellate court majority blamed Magana for asking Hyundai to update its discovery four months before the trial date and seeking to add a post-manufacture failure to warn claim: “We do not believe that Magana could have taken these actions without anticipating a trial date continuance.” COA ¶ 44. The majority has it backwards. Magaña did not anticipate a continuance because his counsel had no idea that Hyundai had withheld discovery of other seat back failures. 1/13/06 RP 61-62. Magaña moved to amend only upon learning of the other failures, abandoning the motion only to avoid a continuance. *Id.* Far from “anticipating” a continuance, Magaña did everything possible to avoid it, even dropping his meritorious claim of post-manufacture failure to warn.

The majority suggests that Magana’s request for updated responses was a “trial strategy” that should be considered in fashioning a sanction. COA ¶ 44 n. 18. Hyundai’s own expert rejected that theory. 1/18/06 RP 38-39. Moreover, as the dissent notes, it is not mere “trial strategy” to ask for updated discovery: rather, it was Hyundai’s legal duty to update or correct its willful and

deliberate lies or to seek a protective order. COA Dissent ¶¶ 70-74 (Bridgewater, J. dissenting).

The majority tries to justify its criticism of “trial strategy” as consistent with the statement in *Fisons* that “the other party’s failure to mitigate may be considered by the trial court in fashioning sanctions.” COA ¶ 44 n.18, 122 Wn.2d at 356 (citing Schwarzer, *Sanctions Under the New Federal Rule 11 - A Closer Look*, 104 F.R.D. 181, 200 (1985)). Schwarzer’s point was that a party confronted with a frivolous claim should immediately move to dismiss, not engage in lengthy litigation:

“In assessing the damage done [by an FRCP 11 violation], the court should consider the extent to which it is self-inflicted due to the failure to mitigate. **If a baseless claim could have been readily disposed of by summary procedures**, there is little justification for a claim for attorney’s fees and expenses engendered in lengthy and elaborate proceedings in opposition.”

Thomas v. Capital Security Services, Inc., 836 F.2d 866, 879 n. 19 (5th Cir. 1988) (emphasis added) (quoting Schwarzer, 104 F.R.D. at 200). Instead of engaging in the “lengthy and elaborate proceedings” criticized by Schwarzer, Magana accepted at face value Hyundai’s false responses to discovery and then on remand from the first appeal asked for updated responses. This meets (rather than defeats) the *Fisons* goal of mitigating damages.

Moreover, Magaña did not “request additional discovery . . . shortly before trial.” COA ¶ 45. An update request issued four months before trial, but years after the requests were (falsely) answered, is neither dilatory nor “additional discovery.”

The appellate court majority unreasonably implies that Magaña’s trial counsel should have known that Hyundai had hidden seat back failures. Magaña’s counsel could not have anticipated that Hyundai would finally produce even more failures only 12 days prior to trial and would never produce the **Acevedo** case. Had Hyundai met its discovery duties in the first place, no update would have been necessary.

The two-judge majority also inexplicably misstated that “Hyundai timely produced documentation of other similar incidents in compliance with the court’s order.” COA ¶ 45. Not only did Hyundai withhold relevant seat back failures for years, it had not produced the **Acevedo** claim as of the sanctions hearing, even after the trial court order. Even the appellate court majority agreed that the trial court did not abuse its discretion in finding that Hyundai’s willful and deliberate “violations have occurred over a period of time beginning in May of 2000 and continu[ing] through the hearing with respect to the **Acevedo** claim.” FF 6, CP 5315.

C. A continuance necessitated by willfully false discovery responses rewards the offending party and prejudices the innocent party, and in this case delay substantially prejudiced Magana.

The appellate court majority reversed the trial court's findings of prejudice, holding that a continuance is adequate to allow Magana to analyze the late-produced and never-produced OSIs and prepare for a delayed trial. COA ¶ 48. This naïvely second-guesses the trial court's findings. Delay damages an injured plaintiff and the ability to prepare a case for trial.

The entire history of this case, from 2000 to the present, proves that Magaña lost opportunities to establish that Hyundai manufactured defective seats prior to both the first and second trials. All of the experts (including Hyundai's) agreed that there was no time to properly develop this crucial evidence due to Hyundai's last-minute disclosures. 01/17/06 RP 115, 136-40; 01/18/06 RP 16-17, 18; CP 2665-66, 2668-69, 2670, 2651-54, 2655-62.

Withholding relevant evidence creates obvious prejudice:

The most obvious and important type of prejudice arises when a party blocks its opponent's access to evidence that the opponent needs to fairly litigate a consequential issue, claim, or defense. Sanctions may also be appropriate when a party, in violation of a discovery order, waits until the eve of trial to produce volumes of new evidence, resulting in a considerable waste of time and money to the opposing party.

7-37 MOORE'S FED. PRAC. *Civil* § 37.50[1][a]. Magaña's lost trial-preparation opportunities obviously prejudiced him. Yet the appellate court majority never mentions them. Ignoring prejudice does not make it go away.

The appellate majority substituted its own conclusions for the trial judge's finding that Magana suffered prejudice like the prejudice in **Behr**: the violations were willful; Magana was off investigating one thing when he should have been investigating the undisclosed seat back failures; the undisclosed evidence strengthened plaintiff's case and weakened defendant's case; the evidence went to defect and causation; the violation undermined the administration of justice; and it was too late to prepare for trial. FF 50-60, CP 5328-31. This case was worse than **Behr**, in which the evidence was still available; here evidence was lost or destroyed.

The appellate court majority's final substitution of its own discretion regarding prejudice rejects the trial court's correct finding that more delay harms Magaña and rewards Hyundai:

Lastly, the trial court found that a continuance would not benefit Magana, but would benefit Hyundai. CP at 5333. We disagree. The purpose of the trial process is to uncover the truth. . . . Allowing Magana to investigate the incidents of seat failure will shed light on whether Hyundai

manufactured and sold a defective product. Thus, further investigation is likely to assist in resolving the merits of Magana's case.

COA ¶ 48. The time for uncovering truth and investigating was: in 2000, when Magaña asked for the OSIs; immediately upon remand after the first appeal; or, upon Magaña's request for supplementation. But by giving Hyundai yet another chance, the appellate court majority condoned Hyundai's dishonesty.

The appellate majority's refusal to acknowledge the prejudice of the passage of time ignores a fundamental precept of fairness – justice delayed is justice denied. ***Asarco, Inc. v. Dep't of Ecology***, 145 Wn.2d 750, 786, 43 P.3d 471 (2001) (Sanders, J., dissenting). The Legislature has created the three-year statute of limitations precisely because the passage of time impairs fair trial – as memories fade, people die, and inevitably, evidence is lost or destroyed:

Stale claims, from their very nature, are more apt to be spurious than fresh; old evidence is more likely to be untrustworthy than new. Time dissipates and erodes the memory of witnesses and their abilities to accurately describe the material events. In time witnesses die or disappear, and the longer the time the more likely this will happen.

Ruth v. Dight, 75 Wn.2d 660, 664-65, 453 P.2d 631 (1969). These truths apply equally here, when a defendant lies and evades discovery over many years.

The appellate court shakes the bedrock principle of timely justice in reversing the trial court's findings of prejudice. See, e.g., WASH. CONST. ART. I, § 10 ("Justice in all cases shall be administered . . . without unnecessary delay"). This Court should uphold this fundamental constitutional principle, not require Jesse Magaña to wait for years just to investigate the documents Hyundai inarguably had to produce, but willfully and deliberately lied about so long ago.

The appellate court majority substitutes its own finding that no evidence has been lost due to Hyundai's false and misleading responses, COA ¶ 46, for the trial court's FF 55, CP 5329, that evidence was lost. It was error to invade the trial court's fact-finding, which was supported by substantial evidence. 1/17/06 RP 90-96, 98-102.

The trial court's findings of willfulness and prejudice and the supporting evidence easily distinguish this case from the three cases on which Hyundai relies. Answer to PR 14-15. In **Burnet**, this Court applied the principles of **Fisons** to reverse a trial court for

striking a claim from a case where “a significant amount of time yet remained before trial” and there was no finding of willfulness. ***Burnet v. Spokane Ambulance***, 131 Wn.2d 484, 496-97, 933 P.2d 1036 (1997). The Court reversed a dismissal of the plaintiff’s case in ***Rivers*** because there was no finding of prejudice. ***Rivers v. Wash. State Conference of Mason Contractors***, 145 Wn.2d 674, 694, 698, 41 P.3d 1175 (2002). In ***Mayer***, this Court affirmed because the requirements of showing substantial prejudice and willfulness do not apply to a monetary sanction. ***Mayer v. Sto Indus., Inc.***, 156 Wn.2d 677, 690, 132 P.3d 115 (2006).

The appellate court majority offers discovery-abuse victims a Hobson’s choice: either forgo your right to a fair and timely discovery process, or forgo your right to a fair and timely trial. Justice cannot require Magaña to prove beyond any possible doubt that Hyundai’s willful and deliberate lies deprived him of a fair and timely trial: the continuance is harm. Jesse is not well. Delay is his enemy.

D. Appellate courts should deter would-be wrongdoers, not overweigh the severity of default.

Fisons notes that, “[m]isconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse

will instead resort to it in self-defense.” 122 Wn.2d at 355 (quoting Schwarzer, 104 F.R.D. at 205). The appellate court majority’s opinion is directly contrary to the strong Washington tradition of appellate court intolerance for willful and deliberate lying, from *Lowry v. Moore*, 16 Wash. 476, 48 P. 238 (1897), through *Associated Mortgage, supra*; *Fisons*, and *Behr, supra*. This Court should reverse and reinstate the trial court’s sound decision.

The United States Supreme Court has warned that reversing a sanction emboldens other would-be violators:

There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. . . .

But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, **but to deter those who might be tempted to such conduct in the absence of such a deterrent.** If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

NHL, 427 U.S. at 642-43 (emphasis ours). Reversing this default judgment places all would-be violators on notice that, at least in

Division II, lying in discovery is a no-lose proposition: if caught, you'll get more delay for a second chance.

The appellate court decision completely undermines the crucial **Fisons** goal of deterrence. This Court should reinstate the trial court's carefully reasoned exercise of discretion. Jesse Magaña and our system of justice deserve no less.

CONCLUSION

For the reasons stated above, this Court should reverse the appellate court majority and reinstate the judgment.

RESPECTFULLY SUBMITTED this 6 day of November, 2008.

Paul W. Whelan, WSBA 2308
Ray Kahler, WSBA 26171
STRITMATTER KESSLER
WHELAN COLUCCIO

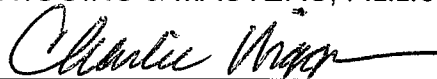
Derek Vanderwood, WSBA 24257
ENGLISH, LANE, MARSHALL &
VANDERWOOD, PLLC

Peter O'Neil, WSBA 28198
PETER O'NEIL,
ATTORNEY AT LAW

Michael E. Withey, WSBA 4787
LAW OFFICES OF MICHAEL
WITHEY

Alisa Brodkowitz, WSBA 31749
BRODKOWITZ LAW

WIGGINS & MASTERS, P.L.L.C.


Charles K. Wiggins, WSBA 6948
Kenneth W. Masters, WSBA 22278
Shelby Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE

I certify that I caused to be emailed and mailed, postage prepaid, via U.S. mail, a copy of the foregoing SUPPLEMENTAL BRIEF OF PETITIONER on the 6 day of November 2008, to the following counsel of record at the following addresses:

Michael B. King
Carney Badley Spellman PS
701 5th Ave Ste 3600
Seattle, WA 98104-7010

Derek Vanderwood
English, Lane, Marshall &
Vanderwood, PLLC
12204 SE Mill Plain Blvd, Ste 200
Vancouver, WA 98684-6026

Paul W. Whelan
Stritmatter Kessler
Whelan Coluccio
200 Second Avenue West
Seattle, WA 98119

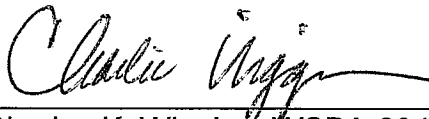
Doug F. Foley
Foley Buxman, PLLC
Park Tower V
13115 NE Fourth Street, Ste 260
Vancouver, WA 98684

Alisa Brodkowitz
Brodkowitz Law
3600 Fremont Ave. N.,
Seattle, WA 98103

Peter O'Neil
Attorney at Law
3300 East Union Street
Seattle, WA 98122

Michael E. Withey
Law Offices of Michael Withey
601 Union St Ste 4200
Seattle, WA 98101-4036

Heather K Cavanaugh
Jeffrey D. Austin
Miller Nash LLP
111 SW 5th Ave Ste 3400
Portland, OR 97204-3614



Charles K. Wiggins, WSBA 6948
Attorney for Petitioner